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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1051

CITY OF ROHNERT PARK, a municipal corporation,
Petitioner,

vs.

MOON LANDRIEU, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

TO the HONORABLE WARREN E. BURGER, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The Respondents City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa (now known as the Redevelopment Agency of the City of Santa Rosa) respectfully pray that the petition of City of Rohnert Park for a writ of certiorari to review the Opinion and Order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 26, 1979 be denied.

PERTINENT STATUTES

1. California Health and Safety Code sections 33501, 33502 and 33503;

2. California Code of Civil Procedure sections 860, 869 and 870.

Copies of these statutes appear in the Appendix to this Brief at pp. 207 through 212.[1]

QUESTIONS PRESENTED

Respondents City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa (the "Santa Rosa Respondents") agree with Petitioner that this case raises the questions:

1. Whether Petitioner has standing to seek injunctive relief under section 16 of the Clayton Act (15 U.S.C. 26) for threatened loss or damage under section 1 and section 2 of the Sherman Act (15 U.S.C. 1 and 2); and

2. Whether, within the context of this proceeding, Petitioner has standing to seek relief under the Ad-

[1] References to App. are to the Appendix to the Petition; references to R.App. are to the Appendix to this Brief in Opposition to the Petition.

ministrative Procedure Act (5 U.S.C. 702, 706) for an alleged violation by Respondent Secretary of Housing and Urban Development of 42 U.S.C. 1460(c) (4) and regulations thereunder (App. pp. 347-367) — sale of land within a federally financed urban renewal project for less than its "fair value."

The Santa Rosa Respondents do not agree that the purported description of the proceedings before the District Court and Court of Appeals set forth on pages 3 through 5 of the Petition accurately reflects the proceedings below, and, for the reasons set forth in the following *Statement Of The Case* and *Reasons For Denying The Writ,* the Santa Rosa Respondents deny that the other questions set forth on pages 5 and 6 of the Petition are presented by this case.

STATEMENT OF THE CASE

Petitioner City of Rohnert Park is a municipal corporation. Petitioner has adopted a general plan that designates certain property within Petitioner's municipal boundaries for commercial development, a designation which permits the development of a regional shopping center on the site. (App. p. 4.) Freeway access is provided to the site by an interchange that was financially subsidized by special grants of federal and state funds totaling $842,000. (R.App. p. 113.) The development of a regional shopping center at the Rohnert Park site would violate the objectives of the regional plan of the Association of Bay Area Governments, the multi-jurisdictional regional planning agency for Petitioner and Respondent City of Santa

Rosa. (R.App. pp. 116-118.)

The principal owner of the Rohnert Park site is Codding Enterprises. Codding Enterprises is also the operator of the only existing regional shopping center in the Santa Rosa area. In early 1973, Codding Enterprises requested that the selection of the developer for a proposed regional shopping center in the Santa Rosa Center Urban Renewal Project be delayed until its president finished his term on the Santa Rosa City Council so that Codding Enterprises could compete for the development opportunity. The Respondent Urban Renewal Agency denied the request and tentatively selected Respondent Ernest W. Hahn, Inc. ("Hahn") as the developer. (R.App. pp. 4-6.)

Since being rejected as the developer for the Santa Rosa site, Codding Enterprises has brought or sponsored more than a dozen lawsuits against the urban renewal project. (R.App. pp. 38-41.) The discovery in this lawsuit disclosed that Codding Enterprises had paid all the attorneys' fees and costs of the City of Rohnert Park through donations to the Rohnert Park Chamber of Commerce. (R.App. pp. 54-58.) The principal impact of these lawsuits and of lis pendenses recorded based on the lawsuits has been to obstruct the public and private financing for the Santa Rosa project.[2]

The Santa Rosa Center Project is located in the center of downtown Santa Rosa. The original 40-acre project adopted in 1961 ("Phase I") was expanded ("Phase II") to approximately 71 acres in 1970 after an

[2] The effect of these lawsuits is more fully described in *Ernest W. Hahn, Inc.* v. *Codding* (D.C. N.D. Ca.) 423 F.Supp. 913 (1976).

earthquake caused major structural damage to buildings in the area. (R.App. pp. 2-3.) Both Phase I and Phase II of the project have received financial assistance under the Federal Housing Act of 1949, as amended (42 U.S.C. 1441 et seq.), pursuant to a loan and grant contract between the Urban Renewal Agency ("Agency") and the predecessor of the United States Department of Housing and Urban Development ("HUD").

Negotiations between Hahn and the Agency during 1973 and 1974 led to a proposal that the project be enlarged by an area of approximately 10 acres to accommodate the shopping center. After completion of the procedures required for the amendment of a redevelopment plan under the California Community Redevelopment Law (Health and Safety Code section 33000 et seq.), the Santa Rosa City Council, on October 29, 1974, adopted an ordinance adding this area, known as Phase III, to the project. (R.App. pp. 6-8.) Phase III does not receive financial assistance under the Housing Act. (R.App. pp. 3, 65.)

On October 29, 1974, the Respondents took several other actions directed toward the accomplishment of the shopping center redevelopment. The City Council and the Agency approved and adopted an environmental impact report for the project. The City Council tentatively approved an amendment to the redevelopment plan making certain street changes and property right adjustments to accommodate the shopping center, and the Agency tentatively approved the contract for sale and development of the 30-acre shopping center site (21 acres in the federal project area and 9 acres in

Phase III).

Shortly thereafter, in November of 1974, Petitioner City of Rohnert Park filed this lawsuit. The complaint alleged that the proposed sale by the Agency to Hahn was for less than fair value in violation of 42 U.S.C. 1460(c)(4), Urban Renewal Handbook section 7214.1, and California Health and Safety Code section 33433, that the Respondent Secretary of HUD could not advance funds to the Agency or approve the contract between the Agency and Hahn prior to preparation of an environmental impact statement for the project, and that the agreement between the Agency and Hahn, if carried out, would be an attempt to monopolize and a combination or conspiracy to monopolize interstate trade or commerce in Sonoma County or some part thereof in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2). (App. pp. 1-17.)

In December of 1974, Codding Enterprises filed an *in rem* validating proceeding in the Sonoma County Superior Court against the same contract between the Agency and Hahn. Codding Enterprises also alleged that the proposed sale to Hahn would violate state and federal antitrust laws and was a sale for less than fair value in violation of 42 U.S.C. 1460(c)(4), section 7214.1 of the Urban Renewal Handbook, and Health and Safety Code section 33433. (R.App. pp. 40-41.)

During late 1974 and early 1975, the Respondent Secretary of HUD prepared and approved an environmental impact statement for the project. Because of the delay occasioned by this process, a new appraisal for the property to be sold to Hahn was prepared by David E. Lane, MAI, an independent appraiser. Ear-

lier independent appraisals for the site had been obtained between 1970 and 1972, and reviewed by David E. Lane in 1973. Lane's 1975 updated appraisal — which established a value of $1,829,520 for the property in Phase II to be conveyed to Hahn — and the earlier appraisals were submitted to HUD and reviewed by Leevern Johnson, a HUD realty specialist. Mr. Johnson conducted a field review to insure the factual accuracy of the Lane appraisals, and found the appraisals to be "in accordance with HUD requirements." (R.App. p. 67.) On November 6, 1975, HUD concurred with the $2 million land price for the 21 acres in Phase II to be conveyed to Hahn and with the Hahn contract.

At a noticed public hearing on December 1, 1975, the Agency considered the appraisal evidence and testimony of Mr. Lane, the HUD approval, and other evidence pertinent to the Hahn contract and its land sale price. Based on this evidence, the Agency determined the sale price to Hahn was for not less than fair value for uses in accordance with the redevelopment plan and authorized the execution of the agreement with Hahn. (R.App. pp. 10, 16-18.) Counsel for Petitioner were personally informed of the December 1, 1975 hearing but did not present any appraisal evidence for the consideration of the Agency. (R.App. pp. 16-18, 41.)

The Hahn contract, as finally approved by the Agency and HUD, requires that Hahn, in addition to paying the land purchase price, pay other costs estimated to total $7.5 million (primarily for parking facilities to be available to the public without charge), pay various fees, and develop the shopping center in

compliance with plans approved by the Agency. (R.App. pp. 23-24, 26-28.) Ernest Hahn testified at the October 29, 1974 hearing and at the December 1, 1975 hearing that the total costs of Hahn for the development of the Santa Rosa shopping center would exceed the costs of a similar center in a suburban location, such as the Rohnert Park site, by $5.6 million to $6 million. (R.App. pp. 14, 17-18.)

In May of 1976, the validating proceeding on the project and the Hahn contract was tried before the Sonoma County Superior Court. In connection with the judgment entered in December of 1976, the state Court made the following conclusions of law:

> "3. The Agency's finding that the Hahn Contract was fair and equitable for the land according to its value for reuse, and that the consideration from Hahn was not less than its fair value for uses in accordance with the redevelopment plan, is supported by substantial evidence contained in the record.
>
> "4. The evidence presented at trial was insufficient for the Court to find that the Agency violated 42 United States Code Section 1460(c)(4), the Urban Renewal Handbook Section 7214.1, Health and Safety Code Section 33433 or any other state or federal law with regard to the adequacy of the consideration from Hahn for the shopping center site, or the parts of said site in Phase II and Phase III. The Agency is required to sell property in the redevelopment project area for not less than its fair value for uses in accordance with the redevelopment plan." (R.App. p. 142.)

The Sonoma County Superior Court also concluded that the Hahn contract and the proposed expenditures of public funds for the project did not constitute ". . . a

monopoly, unlawful discrimination, an unfair practice or unfair competition," and that:

> "Neither the redevelopment plan as now amended, nor the Hahn Contract, nor any other contract or action contested by plaintiffs, is a contract, combination, or conspiracy in restraint of trade, or an action in furtherance of a contract, combination or conspiracy in restraint of trade." (R.App. pp. 143-144.)

On appeal from the trial court judgment, the California District Court of Appeal affirmed the trial court except to require more detailed findings for the ordinance and resolution approving the environmental impact report for the project. The state Court of Appeal sustained the trial court judgment validating the Hahn contract and all other substantive actions taken by the Santa Rosa Respondents to expand the project area and amend the redevelopment plan. (R.App. pp. 190-198.) The California Supreme Court denied a Petition for Hearing of Codding Enterprises. After remand, the Sonoma County Superior Court reaffirmed that the trial court judgment validating the Hahn contract remained final and binding by ruling that a lis pendens recorded against the Santa Rosa site based on the validating proceeding must be expunged because the suit no longer involved "title to or right of possession of the real property." (R.App. pp. 203-205.)

In October 1976, the Respondents in this case moved for dismissal and for summary judgment. Each of the Respondents argued before the District Court that Petitioner lacked standing to sue. (App. pp. 90-93, 107-112, 151-154, 159-160; R.App. pp. 106-108, 170-172.) In support of this argument, Respondents offered a

partial transcript of deposition testimony by Mr. Peter Callinan, the City Manager of Petitioner, which showed that Rohnert Park had no ownership or other interest in the property of the Santa Rosa project, did not pay taxes to Santa Rosa or the federal government, and had no obligation that would be increased by the proposed Santa Rosa development. (R.App. pp. 46-53.) Mr. Callinan's testimony further established that the property interest of Petitioner in the Rohnert Park land designated for commercial development consisted of the ownership of a library site donated to the City by Codding Enterprises and the ownership of a wastewater treatment plant site outside the area of the proposed regional commercial development.

In response to this evidence, Petitioner presented the Affidavit of Roland L. Brust, Petitioner's Director of Public Works. (App. pp. 173-178.) Mr. Brust's affidavit showed that Petitioner had formed an assessment district for public improvements in the area of the Rohnert Park site.

Relying on Mr. Brust's affidavit and on the allegation that the development of a shopping center in Santa Rosa would cause sales tax revenues to accrue to Santa Rosa rather than to Rohnert Park, Petitioner argued that it possessed standing to sue under section 16 of the Clayton Act to vindicate such of its "'own proprietary interest(s)' as are 'congruent with the interest of' its 'inhabitants'," even though the relief sought might be unrelated to competition. *State of California* v. *Automobile Manufacturers Association, Inc. (In re Multidistrict Vehicle Air Pollution M.D.L. No. 31)* (C.A. 9) 481 F.2d 122 (1973), cert. denied 414

U.S. 1045, 38 L.Ed.2d 336, and *State of Washington* v. *Automobile Manufacturers Association (In re Multidistrict Vehicle Air Pollution)* (C.A. 9) 538 F.2d 231 (1976). R.App. pp. 76-79.) Petitioner elaborated its arguments on section 16 standing in a supplemental brief submitted to the District Court. (R.App. pp. 154-157.)

In the motions to dismiss and for summary judgment, Respondents also asserted that the evidence set forth in affidavits presented to the District Court established that the sale to Hahn was properly and lawfully approved and was not for less than fair value in violation of 42 U.S.C. 1460(c)(4), Urban Renewal Handbook section 7214.1, or Health and Safety Code section 33433; that because the challenged conduct of the federal and Santa Rosa Respondents was lawful governmental action, taken pursuant to legislative mandates, Petitioner could not claim redress for any alleged violation of the Sherman Act; and that the Petitioner's bare allegation that Respondents proposed to develop new commercial retail facilities in excess of existing demand failed to state a Sherman Act claim for which relief could be granted. (R.App. pp. 162-170.) The Santa Rosa Respondents further argued that Petitioner's claims were barred by the state court validating proceeding and that Petitioner's allegation that the Hahn contract afforded an unfair competitive advantage to Hahn was conclusively refuted by evidence submitted to the District Court. (App. pp. 140-146.) (R.App. pp. 162-165.)

The Order Granting Summary Judgment of the District Court focused upon *In re Multidistrict Vehicle Air Pollution*, supra, the source of Petitioner's rationale for its standing claim, and on *United States* v. *Aluminum Co. of America* (C.A. 2) 148 F.2d 416 (1945), the purported basis of Petitioner's contention that the construction of excess retail capacity constituted a violation of the Sherman Act. The Court observed that *In re Multidistrict Vehicle Air Pollution*, supra, affords a right to injunctive relief only where the plaintiff can establish an on-going violation of the antitrust laws. The Court also noted that *Alcoa* condemned not the creation of excess capacity *per se* but rather such conduct when done to perpetuate a monopoly. Since the allegations and the evidence before the Court showed neither that Respondents had a monopoly nor any predatory conduct which would support a finding of specific intent to monopolize, the Court concluded that Petitioner had offered nothing from which a trier of fact could find or infer an on-going violation of the antitrust laws. The Court further concluded that the conduct complained of by Rohnert Park consisted of the exercise of lawful duties and authorities by government agencies and officials, for which relief was barred by *Parker* v. *Brown* (1943) 317 U.S. 341, 351, 87 L.Ed. 315, 326. (App. p. 187.)

The final opinion of the Court of Appeals, like the decision of the District Court, focused upon Petitioner's standing argument derived from *In re Multidistrict Vehicle Air Pollution*, supra. The Court opined that to support its claim of standing under section 16, Rohnert Park was required to show (1) a threatened loss or injury cognizable in equity (2) proximately resulting from an alleged antitrust violation.

By finding no antitrust violation, the District Court had implicitly rested its decision on the second of these two requirements. The Court of Appeals concluded that Rohnert Park failed both tests.

The Court of Appeals declared that Rohnert Park, as a municipal subdivision, could not sue as *parens patriae* to protect the interests of its citizens who might be injured by loss of investment profits or tax revenues. And it was not clear from the allegations and evidence how, if at all, Rohnert Park's own proprietary interest in a library site and a site set aside for a wastewater facility would be adversely affected by the construction of a regional shopping center in Santa Rosa. (App. pp. 228-229.) By analogy to *Warth* v. *Seldin* (1975) 422 U.S. 490, 45 L.Ed.2d 343, the Court of Appeals reasoned that Rohnert Park had failed to demonstrate an injury "proximately resulting from an antitrust violation" because the alleged adverse effect on Rohnert Park would result from any competition in the relevant market, whether or not the competition violated the antitrust laws or the Housing Act, and because the supposition that Rohnert Park would benefit if a sale to Hahn for less than fair value was voided or enjoined was entirely speculative. (App. p. 230.) Judicial relief would not bar continuing competition.

The Court of Appeals employed similar reasoning in rejecting the Petitioner's claim of standing under the Administrative Procedure Act (5 U.S.C. 702, 706). The Court found that Rohnert Park failed to meet the minimum constitutional case or controversy requirement for standing of Article III because the relationship between the alleged potential injury to Rohnert

Park and the alleged illegal land sale approvals was too attenuated; there was no showing that prospective injury was "likely to be reduced by a favorable decision," and the scenario that would avert the injury was too "conjectural" and "hypothetical." (App. pp. 239-240.)

SUMMARY OF THE ARGUMENTS

The petition for writ of certiorari should be denied because Petitioner had an opportunity to present evidence and arguments on the issue of standing to the District Court and exercised that opportunity. The Court of Appeals based its decision that Petitioner lacked standing to sue upon uncontroverted allegations and evidence presented. The appellate court's adoption of different reasons than the District Court for reaching the same conclusion that Petitioner was not entitled to sue did not constitute a departure from the accepted course of judicial proceedings nor a denial of due process of law.

The Court of Appeals applied well-established principles in determining that Petitioner's claims failed to satisfy the minimum constitutional requirements of a case or controversy and that Petitioner lacked a sufficient interest to invoke Section 16 of the Clayton Act. Neither the decisions of this Court nor those of the Courts of Appeals conflict with the conclusion that the putative injury of the Petitioner is too remote and speculative and the consequence of judicial intervention too conjectural to give Petitioner standing to sue.

The decision of the Court must also be sustained, and the petition for certiorari denied, because the Petitioner failed to state a cause of action, because the

Petitioner is collaterally estopped from raising the claims made in this case, and because uncontroverted evidence presented in the District Court established that certain allegations of the complaint essential to Petitioner's claims are untrue.

REASONS FOR DENYING THE WRIT

I

The Arguments of the Parties on the Issue of Standing Were Fully Developed Before the District Court, and the Decision of the Court of Appeals on this Issue was Based on the Uncontroverted Pleadings and Evidence Presented to the District Court by Both Petitioner and Respondents. The Court of Appeals' Adoption of Different Reasons Than the Trial Court for the Conclusion That Petitioner was not Entitled to Sue did not Constitute a Departure From the Accepted Course of Judicial Proceedings nor a Denial of Due Process of Law.

As a first reason why certiorari should be granted, Petitioner asserts that it was wrongfully denied notice and an opportunity to be heard, and deprived of due process of law, by the Court of Appeals' determination that the relationship between the Petitioner's claimed injury and the alleged illegal approval of the Hahn land sale price was too attenuated to meet minimum Article III standing requirements. Petitioner contends the Court of Appeals was required to accept the conclusory allegation of Paragraphs V(b) and VIII(b) of the Complaint that the consequence of the Respondents' approval of the sale price to Hahn would be to eliminate actual and potential competition, "all to the irreparable loss or damage of Plaintiff City." (Petition

pp. 17-18.) Petitioner charges that the Court of Appeals' refusal to accept these conclusory assertions as fact, and the Court's determination that the alleged interest and injury of Rohnert Park were too conjectural to justify relief, constituted an impermissible finding of fact on an issue not addressed by the District Court. According to Rohnert Park, the Court of Appeals could not order dismissal of the case unless there was no possibility that Petitioner could amend the complaint to state a claim for relief and standing to assert it. (Petition p. 15.)

The fundamental fallacy of Rohnert Park's argument is its erroneous presupposition that the issue of standing was not argued before the District Court. In the District Court, the Respondents offered the deposition testimony of Mr. Callinan and Petitioner offered the affidavit of Mr. Brust to show facts relevant to the issue of standing. While the evidence of the Santa Rosa Respondents may not have "pierced" the allegations of the complaint concerning the inhibiting effects of the Santa Rosa shopping center upon Rohnert Park developers, the Respondents did conclusively refute the "reality" of the Petitioner's injury with undisputed evidence that Petitioner's only proprietary interest in the Rohnert Park site was the ownership of the donated library site, that Hahn did not have a competitive advantage — unfair or otherwise — over Rohnert Park developers and merchants, and that the HUD and Agency approvals of the Hahn contract complied with all laws and regulations referred to by Petitioner. All parties extensively argued the issue of standing in briefs to the District Court.

The District Court granted summary judgment because Petitioner failed to allege facts demonstrating an on-going antitrust violation, a necessary prerequisite to Clayton Act section 16 relief under *In re Multidistrict Vehicle Air Pollution,* supra, the decision Petitioner primarily relied upon for its assertion of standing. By further concluding that *Parker* v. *Brown*, supra, barred Petitioner from relief, the District Court implicitly resolved that the conduct of the local and federal government Respondents did not violate the Housing Act.

Petitioner did not request a rehearing, did not request leave to introduce additional evidence, and did not request leave to file an amended complaint at any time during the proceedings in the District Court. In fact, Petitioner was so satisfied with the evidence and arguments it presented to the District Court on the issue of standing that its brief in opposition to the summary judgment motion stated:

> "At pages 23-33 of their brief, the Santa Rosa defendants argue that plaintiff lacks standing to sue. This argument is dealt with fully at pages 1-6 of this Brief." (R.App. p. 99.)

At no time has Rohnert Park explained what additional facts it could plead to overcome the inadequacy of its claim to standing.

The opinion of the Court of Appeals addressed the same pleaded facts and evidence concerning the Petitioner's alleged interest and injury that were considered by the District Court. The Court accepted as true all uncontroverted facts pleaded by Rohnert Park, but obviously refused to accept the legal conclusion of

Paragraph VIII(b) of the Complaint that these factual allegations, as further developed and explained by the evidence, demonstrated a threat of irreparable loss or damage to Petitioner. The Court of Appeals resolved all doubts in the pleadings in favor of the Petitioner. For example, it assumed that the value of real property owned by Petitioner might decrease if the Santa Rosa shopping center was developed, even though the complaint contains no such allegation. The Court did not advert to, much less rely upon, the uncontroverted evidence presented by the Santa Rosa Respondents demonstrating that the Hahn contract, considering both its burdens and its benefits, placed Hahn at a $6 million disadvantage in competing with Rohnert Park developers.

Petitioner's assertion that the Court of Appeals improperly ignored its allegations concerning threatened loss or damage and made impermissible findings of fact on the subject Petitioner's "injury" both ignores the record of the proceedings below and misconceives the issue. Standing is a question of law to be resolved by the court on the basis of the facts plead and presented by way of affidavit. *In re Western Liquid Asphalt Cases* (C.A. 9) 487 F.2d 191, 199 (1973), cert. denied 415 U.S. 919, 39 L.Ed.2d 474; *John Lenore & Co.* v. *Olympia Brewing Co.* (C.A. 9) 550 F.2d 495, 498 (1977). In opposing the motion for summary judgment, Petitioner could not simply rely on the legal conclusion that it was threatened with irreparable injury. *Franke* v. *Midwestern Okl. Development Authority* (W.D. Okl.) 428 F.Supp. 719, 723 (1976); *Boothe* v. *Hickel* (D.C. Nev.) 347 F.Supp. 1273 (1969); see *Warth* v. *Seldin*,

422 U.S. at 503-504. Rohnert Park was required to respond to the proof that its only proprietary interest in the Rohnert Park site was its ownership of a library site by producing evidence of specific facts showing a genuine issue for trial with respect to the claim that Petitioner faced a threat of an "injury in fact" to a substantive and cognizable interest. See, *First Nat. Bank* v. *Cities Service Co.* (1968) 391 U.S. 253, 270, 20 L.Ed.2d 569, 581; *Daily Press, Inc.* v. *United Press International* (C.A. 6) 412 F.2d 126 (1969); *Tilden Financial Corp.* v. *Palo Tire Serv., Inc.* (C.A. 3) 596 F.2d 604, 607-608 (1979). The affidavit of Roland L. Brust concerning assessments at the Rohnert Park site is plainly inadequate for this purpose. Petitioner conceded that only the landowners, and not the City of Rohnert Park, are liable for repayment of the bonds issued to fund the assessment district. (R.App. pp. 176-179.)

A court of appeals may affirm the judgment of a district court on any ground that finds support in the record. *Jaffke* v. *Dunham* (1957) 352 U.S. 280, 281, 1 L.Ed.2d 314, 315. The cases cited by Petitioner do not support a contrary rule. *Singleton* v. *Wulff* (1976) 428 U.S. 106, 49 L.Ed.2d 826; *Hormel* v. *Helvering* (1941) 312 U.S. 552, 85 L.Ed. 1037; *British Airways Bd.* v. *Port Authority of New York* (C.A. 2) 558 F.2d 75 (1977); *Denton* v. *Mr. Swiss of Missouri, Inc.* (C.A. 8) 564 F.2d 236 (1977); and *Heirs of Fruge* v. *Blood Services* (C.A. 5) 506 F.2d 841 (1975), which are cited by Petitioner, stand only for the proposition that a court of appeals may not, except in unusual circumstances, affirm a summary judgment on a ground on which the losing party had no opportunity to argue and present evidence before the district court. *California Diversified Promotions, Inc.* v. *Musick* (C.A. 9) 505 F.2d 278 (1974) only requires a similar opportunity to be heard in response to a *sua sponte* dismissal by a trial court. Each of the foregoing decisions recognizes the rule that a court of appeals may affirm the granting of summary judgment on any ground supported by the record if the parties had opportunity to argue the relevant issue in their briefs and present evidence on it, even though such ground was not a basis for the decision of the district court. *Helena Rubinstein, Inc.* v. *Bau* (C.A. 9) 433 F.2d 1021 (1970); *United States* v. *General Motors Corporation* (C.A. D.C.) 518 F.2d 420, 441 (1975); *Paskaly* v. *Seale* (C.A. 9) 506 F.2d 1209, 1211, fn. 4 (1974).

The opportunity of Rohnert Park to justify its claim to standing is manifest by the briefs and affidavits submitted to the District Court. Where, as here, Petitioner has been afforded the opportunity to allege particularized facts and present evidence in support of its claim of standing to sue, but the Petitioner's standing still does not adequately appear from all materials in the record, the complaint must be dismissed. *Warth* v. *Seldin*, 422 U.S. at 501-502. Such result follows, rather than departs from, the accepted and usual course of judicial proceedings.

II

The Decision of the Court of Appeals Follows and Appropriately Applies the Minimum Requirements for Standing of Article III and the Accepted Principles for Determining Standing Under Section 16 of the Clayton Act. Neither the Decision of the Third Circuit Referred to by Petitioner nor the Decisions of This

Court Conflict With the Decision Below nor Have any Such Decisions Found Standing in Factual Circumstances Where the Alleged Injury of the Plaintiff was as Remote and Speculative as the Injury Alleged by Rohnert Park or the Consequences of Judicial Intervention as Conjectural and Hypothetical.

Relying on *Warth* v. *Seldin*, supra, and *O'Shea* v. *Littleton* (1974) 414 U.S. 488, 38 L.Ed.2d 674, the Court of Appeals concluded that Rohnert Park did not satisfy the causal relationship requirement for standing of Article III because it did not appear from the pleadings and evidence that the prospective adverse effect upon Rohnert Park was likely to be reduced by a favorable decision. Petitioner does not quarrel with this constitutional principle of standing that the Court of Appeals stated and applied. It merely objects to the Court's conclusion and contends that the Court overlooked or gave insufficient weight to allegations of the complaint. These objections turn upon the analysis of the particular facts concerning the project financing presented to the trial court and the construction and interpretation of the Hahn contract and other documents. Certiorari should not be granted for such a review of evidence and discussion of specific facts. *United States* v. *Johnston* (1925) 268 U.S. 220, 227, 69 L.Ed. 925, 926.

The opinion of the Court of Appeals summarizes some of the reasons why it is mere speculation to suggest that the judicial remedy of voiding or enjoining the conveyance of land to Hahn at the $2 million contract price will lead to the construction of the shopping center in Rohnert Park, the only result that will

alleviate the adverse effect complained of by Petitioner. The undeniable validity of this conclusion by the Court is manifest from the evidence relating to the first item on its list of hypothetical events that must occur before Rohnert Park would derive any benefit from the judicial remedy, namely, "that Hahn and the Agency would be unable to renegotiate a sale of the property. . . ." (App. p. 239.) According to the affidavit of Petitioner's appraiser, Mr. Stahr, the average value per square foot of the Santa Rosa site, based on small parcel sales, was $5 per square foot or approximately $4,356,000 for the land within the federally funded portion of the project, the portion of the sale approved by HUD. (App. pp. 170-171.) This sum is $2,356,000 more than Hahn was to pay for the land under the Hahn contract. But that Hahn contract also provides that Hahn is to pay, in addition to his land purchase price, more than $7.5 million for public parking facilities and other purposes. (R.App. pp. 23-28.) The Agency and Hahn could easily arrive at new contract

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[3] This example illustrates the fundamental misconception of the public financing of urban renewal inherent in Plaintiff's theory that a low land sale price subsidizes a competitive advantage for the urban renewal project developer. Under the loan and grant contract, HUD loans funds for redevelopment to the local agency and later confers a grant to the project by forgiving repayment of three-fourths of the *net* project costs *after deduction of the proceeds from property sales*. A higher land sale price decreases the net project cost thereby shifting public costs from HUD to the local government. This financing method, which is explained in a brief submitted to the District Court (R.App. pp. 162-164), limits the federal financial assistance to the amount of the loan. The Petitioner's repeated assertion that the Santa Rosa project has received $28 million in federal funds double counts by adding the $16 million loan and the $12 million grant. Moreover, this amount constitutes the assistance for the entire project, not merely the public costs related to the Hahn development. As the Affidavit of Mr. Burns indicates, less than $600,000 of this amount will be spent in the shopping center area, and this sum will be spent for streets and other improvements not related to the shopping center itself (R.App. pp. 3-4).

terms by increasing the land sale price to meet Petitioner's estimate for the fair value of the land and decreasing Hahn's consideration paid for other purposes by a corresponding amount.[3]

Here, unlike the situation presented in *Duke Power Co.* v. *Carolina Env. Study Gp.* (1978) 438 U.S. 59, 57 L.Ed.2d 595, there is no substantial probability that the proposed construction will be halted by the relief the Court can afford. Unlike the plaintiff in *Arlington Heights* v. *Metro. Housing Corp.* (1977) 429 U.S. 252, 261-262, 50 L.Ed.2d 450, 462, Rohnert Park cannot claim that the judicial relief it seeks will lead directly to the construction of a specific facility that Petitioner itself proposes to develop and for which it has expended funds for architectural plans and studies. The shopping center that must be built in Rohnert Park if Petitioner is to benefit appears from the facts before the lower court to be nothing more tangible than the glimmer in the mind's eye of unspecified third party developers. Like the alleged tax rate effect on the City of Rochester taxpayers denied standing in *Warth* v. *Seldin*, supra, the putative economic impact of the Santa Rosa project upon Rohnert Park depends upon the decisions of third parties, the potential Rohnert Park site developers who are not parties to the case.

In the circumstances of this case, the necessary causal relationship between alleged illegal action and injury is lacking not only because a judicial remedy would be ineffective, but also because the adverse effect upon Rohnert Park is not the result of the asserted illegality. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.* (1977) 429 U.S. 477, 50 L.Ed.2d 701. Presumably,

the outcome of competition between Hahn and potential Rohnert Park developers will hinge upon their respective economic advantage or disadvantage. The advantage or disadvantage of Hahn is a function of Hahn's total costs, not simply the land sale price. The land price is only a single, variable component of Hahn's total consideration. The land price can be adjusted to match Petitioner's assessment of fair value, and thereby obviate the alleged illegality, without changing the total costs of Hahn. The Court of Appeals recognized that the land price was not the cause of the Petitioner's alleged injury by its statement: ". . .[A]ny competition, whether or not it violates the antitrust laws, might have a similar adverse effect on the City's commercial development." (App. p. 230.) Although the issue addressed in *Brunswick*, supra, was whether the plaintiff had been injured "by reason of" an antitrust violation within the meaning of section 4 of the Sherman Act, the Court's analysis in that case is equally appropriate here and confirms the correctness of the Court's conclusion that the relationship between the allegedly illegal land sale price and the Petitioner's claimed injury is insufficient to satisfy the minimum causal relationship requirement for standing of Article III.

Petitioner's assertion that the decision of the Court of Appeals conflicts with *Mid-West Paper Products Co.* v. *Continental Group* (C.A. 3) 596 F.2d 573 (1979) cannot withstand scrutiny. In *Mid-West Paper Products Co.*, the Third Circuit found that indirect purchasers of paper bags had standing under section 16 of the Clayton Act to sue paper bag manufacturers engaged

in a price fixing arrangement. The Court noted the clear cause and effect relationship between the defendant's violation and the plaintiff's injury with the following comment:

> "...indirect purchasers can state unequivocally that under all circumstances prevalent in the real economic world,[81] money is passing from their hands into the pockets of the price fixers as a result of the conspiracy, and that no rational pricing decisions by any intermediary will erase this fact.[82]" (Footnotes omitted.) (*Mid-West Paper Products Co.* v. *Continental Group*, supra at p. 593.)

In its footnotes to the quoted passage, the Third Circuit emphasized the difference between the inevitable, unalterable loss of the indirect bag purchasers and the circumstances of plaintiffs denied standing in other cases because their alleged injury, like that of Rohnert Park, depended upon intermediary decisions of third parties.

Both the Third Circuit in *Mid-West Paper Products Co.*, supra at p. 591-592, and the Court in this case (App. p. 228) applied the liberal rule for section 16 standing of *Tugboat, Inc.* v. *Mobile Towing Co.* (C.A. 5) 534 F.2d 1172 (1976); that entitlement to injunctive relief against an antitrust violation under section 16 is limited only by general rules of standing; a plaintiff need show only that he is threatened by injury proximately caused by the defendant. Measured by general rules of standing, there was no question that enjoining the manufacturer's price fixing arrangement in *Mid-West Paper Products Co.*, supra, would benefit the indirect purchasers of paper bags. The contrary conclu-

sion as to Rohnert Park is founded upon fundamental differences in factual circumstances. Here, for the reason already discussed, there is no indication that the purported adverse effect on Petitioner of a shopping center not being developed in Rohnert Park would be avoided by the exercise of the Court's judicial powers. *Duke Power Co.* v. *Carolina Env. Study Gp.*, 438 U.S. at 74-75.

The Court of Appeals found that besides failing to allege a sufficient causal relationship between the claimed injury and the challenged land price approvals, Rohnert Park had also failed to assert or identify a cognizable interest sufficient to assert standing to sue. Although the Court discussed the "speculative" nature of Petitioner's interest only with reference to section 16 of the Clayton Act, the inadequacy of the Petitioner's claim in this respect is constitutional in dimension. The showing of a distinct and palpable injury to a specific, identifiable interest is an essential prerequisite of a "case or controversy" sufficient to justify invocation of federal court jurisdiction. *Warth* v. *Seldin*, 422 U.S. at 498-501; *Duke Power Co.* v. *Carolina Env. Study Gp.*, 438 U.S. at 72. Because the alleged impact of the Santa Rosa shopping center upon Rohnert Park is both indirect (rather than direct) and threatened or prospective (rather than actual), Rohnert Park was required to show specific, concrete facts demonstrating the "immediacy and reality" of its claim of injury. *Simon* v. *Eastern Ky. Welfare Rights Org.* (1976) 426 U.S. 26, 44-45, 48 L.Ed.2d 450, 463-464; *O'Shea* v. *Littleton*, supra. Absent allegations or evidence of a demonstrable, particularized injury,

there can be no confidence of "a real need to exercise the power of judicial review" or that relief can be framed "no broader than required by the precise facts to which the court's ruling would be applied." *Schlesinger* v. *Reservists to Stop the War* (1974) 418 U.S. 208, 221-222, 41 L.Ed.2d 706, 718-719; *Warth* v. *Seldin*, 422 U.S. at 508.

The alleged proprietary interest of Rohnert Park does not satisfy these criteria. Rohnert Park is a municipal corporation. It is not a developer. It is not a retail merchant. Rohnert Park owns a donated library site within the area proposed for regional commercial development and a wastewater treatment facility site in another area zoned commercial, but it has not alleged or demonstrated any facts to show that the value or any other aspect of its interest in these properties would be adversely affected by the development of the Santa Rosa project. Rohnert Park alleges that it has formed an assessment district on behalf of property owners at its proposed regional shopping center site, but concedes that only the property owners, and not the City itself, are liable for the public improvement assessments of the district. (R.App. p. 177.) Rohnert Park does not assert that the streets, sewers and other public improvements of the district will become worthless, or even be affected in value, if the shopping center is developed in Santa Rosa.

Petitioner, unlike the plaintiffs in *City of Davis* v. *Coleman* (C.A. 9) 521 F.2d 661 (1975), has not asserted a cognizable, non-economic, municipal interest, and the facts presented to the lower courts establish that Petitioner cannot do so. The complaint alleges that the

purpose of Petitioner's adoption of a general plan which designates the Rohnert Park site "for development of commercial facilities including a regional shopping center" was "to further its own proprietary interests; and to increase its sales tax revenues; and to further the interests of its inhabitants, property owners and taxpayers." (App. p. 4.) Thus, Petitioner's own pleadings admit that the general plan interest of Rohnert Park is in reality a proprietary and economic interest rather than a municipal interest.

Rohnert Park cannot claim that the Santa Rosa project infringes upon its local planning interests. The statutory justification for general plans in California is to enable local government to control the use of private property and thereby insure that private development is compatible with the interests of the community as a whole. See *O'Loane* v. *O'Rourke* (1965) 231 Cal.App.2d 774, 42 Cal.Rptr. 283. The function of the general plan is regulatory, not entrepreneurial. Rohnert Park does not allege the Respondents' actions deprive it of the ability to control or regulate private developers who may seek to develop the land at the Rohnert Park site. Santa Rosa has not imposed any zoning or other regulatory control upon the Rohnert Park site.

Furthermore, Rohnert Park cannot assume the role of a champion of regional planning interests in this litigation. As a California general law city "organized pursuant to Part 1 of Division 2 of the Government Code" (App. p. 2), the powers and purposes of Rohnert Park are limited to those expressly conferred by the Legislature, together with the powers necessarily in-

cident to those expressly granted or essential to the declared object and purposes of the City. *Irwin* v. *City of Manhattan Beach* (1966) 65 Cal.2d 13, 51 Cal.Rptr. 881, 415 P.2d 769. With respect to developments of regional significance, the California Legislature, by its District Planning Law (Government Code section 66100-66390), has mandated the preparation of regional plans to adapt and harmonize the interests of local municipalities and coordinate the physical development of the area of the district in a manner designed to promote the general welfare and prosperity of its people. (Government Code section 66241.) The record in this case shows that Petitioner is proceeding directly contrary to regional plan objectives by promoting the development of a regional shopping center at the suburban Rohnert Park site rather than in downtown Santa Rosa, the local urban center. (R.App. pp. 116-118.) Rohnert Park, like the taxpayer petitioners found to lack standing in *Warth* v. *Seldin*, 422 U.S. at 509, has not and cannot assert any right under the Constitution or any statute to be free of indirect or incidental economic impacts that may result from the governmental activities of a neighboring municipality, Santa Rosa.

Rohnert Park's effort to claim standing as the representative of developers, taxpayers and property owners founders upon the prudential limitations of standing. Rohnert Park alleges no concrete and particularized injury to itself or those it claims to represent. *Warth* v. *Seldin*, 422 U.S. at 509-513; *Buckley Towers Condominium, Inc.* v. *Buchwald* (C.A. 5) 533 F.2d 934 (1976). Nothing in the record indicates that

the Rohnert Park site cannot be developed for some use other than a regional shopping center or that such alternative development would be less profitable and beneficial than a shopping center to the landowners of the site and the citizens of Rohnert Park.

Rohnert Park's claim to representational standing is further discredited because the persons it purports to represent are plainly capable of asserting their own rights. See *Warth* v. *Seldin*, 422 U.S. at 510. Indeed, Codding Enterprises, the principal developer and taxpayer that Rohnert Park claims to represent has not only litigated the same Housing Act and antitrust violation issues in the state court validating proceeding, but has also financed Rohnert Park's own lawsuit and more than a dozen others.

As to the citizens and taxpayers that Petitioner purports to represent (as distinguished from the property owners of the proposed commercial site), the asserted impact of the Santa Rosa project is only a general, abstract, and indirect economic effect, an injury shared in substantially equal measure by all citizens, government entities, and taxpayers within Petitioner's defined relevant market area but outside of the City of Santa Rosa. Such a generalized grievance cannot justify judicial intervention. *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. at 221-227; *Warth* v. *Seldin*, 422 U.S. at 499. Assuming *arguendo* that some acts of the Respondents can be characterized as violations of the antitrust or of the housing and redevelopment laws, nothing in the record distinguishes Rohnert Park in any meaningful way from every other city that happens to be the home of a person or firm injured by a

violation of these laws. To confer standing to sue upon a city in this circumstance removes all limitations on standing for a municipal corporation and grants to a city a right to intervene in almost every conceivable grievance of its citizens and taxpayers.

III

Certiorari Should be Denied Because the Decision of the Court of Appeals can be Sustained on Numerous Alternative Grounds, Including the Grounds on Which the Case was Decided by the District Court and the Grounds Set Forth in the First Opinion of the Court of Appeals.

In reviewing the decision of a court of appeals, all grounds for affirming the decision may be considered, including contentions not passed upon or even rejected by the lower court. *Langnes* v. *Green* (1931) 282 U.S. 531, 535-539, 75 L.Ed. 520, 523-525. The Court of Appeals decision in this case is supported not only by the grounds set forth in the decision itself, but also by the reasons explained in the withdrawn opinion of the Court of Appeals decision, the grounds of the District Court decision, and the several other justifications for dismissal advanced by the Respondents before the lower courts.

The first opinion of the Court of Appeals (App. pp. 198-201) concluded that Rohnert Park was barred from relitigating the issue of whether the land sale price of the Hahn contract was less than fair value by the collateral estoppel effect of the judgment in the Santa Rosa Respondents' favor in the state court validating proceeding. The Court's final opinion noted

this ground but declined to rest its decision upon it. (App. p. 234.)

As in *Montana* v. *United States* (1979) ___ U.S. ___, 59 L.Ed.2d 210, the same party that brought the state court validating proceeding has also financed and by that means controlled this lawsuit. The affidavits submitted in support of the motion for summary judgment established that the evidence on the issue of fair value submitted by the Petitioner in this case was identical to the evidence presented to the state court.[4] (R.App. pp. 126-140.) Petitioner does not suggest that the state court proceedings were unfair, that the law has changed, or that any relevant facts are different for the resolution of the same antitrust and housing law issues in this case.

The state court suit by Codding Enterprises was an *in rem* proceeding. The state statutes, Health and Safety Code section 33503 and Code of Civil Procedure sections 869 and 870 (R.App. pp. 209, 211-212), provide that all persons are bound by adjudications made in such a validating proceeding. No relief could be granted to Petitioner in this case except relief that would interfere with and collaterally attack the judgment of the state court. For that reason, the justification for requiring Rohnert Park to accept the prior adjudication is even stronger than the rationale for

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[4] Footnote 2 of the Petition suggests that certain sale and leaseback financing documents set forth in the Appendix tc the Petition are evidence of a land value "almost five (5) times what HUD thought was 'fair value' (App. p. 374)." The referenced document clearly shows that the almost five times greater value is a value established for financing purposes of a fully constructed shopping center leased to major department stores for a period of thirty (30) years. The subject of this case is the bare land value, not the completed shopping center value.

holding the plaintiff to be bound by the results of earlier litigation in *Montana* v. *United States*, supra.

The District Court opinion concluded that Petitioner had failed to state a claim for relief under the antitrust laws and that Petitioner's claim was barred by *Parker* v. *Brown*, supra. The inadequacy of Petitioner's "excess capacity" antitrust theory is best explained by the opinion itself. (App. pp. 185-187.) The acceptance of Petitioner's theory of excess capacity and novel limitation of the relevant market to "new" retail space would have the bizarre result of erecting an anti-competitive barrier that would bar new market entrants, such as Hahn, from entering any industry or line of commerce suffering from overcapacity. It would protect the large and established firm against the small expanding firm and the new entrepreneur.

The District Court's reliance on *Parker* v. *Brown*, supra, tacitly implies both that the governmental action of the Respondents was lawful and valid and that the contested acts of the non-federal Respondents are exempt from antitrust liability under *Lafayette* v. *Louisiana Power & Light Co.* (1978) 435 U.S. 389, 55 L.Ed.2d 364. Both of these conclusions are supported by uncontroverted evidence.

While Petitioner disputes the value of the land sold to Hahn, it cannot refute that all appraisal evidence presented to HUD and the Agency supported the Respondents' judgment that the price to Hahn at least equaled the fair value of the property. The highest land value price suggested by the evidence before the Agency was that of Mr. Lane's 1975 appraisal which indicated a total value of $1,829,520 for the land

within the federally financed area of the project. The contract required that Hahn pay $2 million. (R.App. p. 68.)

The federal and state statutes vest in HUD and the Agency the authority to determine whether a sale price is not less than the statutory minimum price. Where, as here, the Petitioner has elected to withhold its appraisal evidence at the hearings of the appropriate administrative bodies, it cannot contest the agencies' approvals simply by offering a new appraiser's opinion that the property was worth more. The approvals of the sale price must be sustained if substantial evidence in the administrative records supports the conclusion that the $2 million price is not less than the fair value of the land. See *Berman* v. *Parker* (1954) 348 U.S. 26, 35-36, 99 L.Ed. 27, 39; *In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, 37-41, 37 Cal. Rptr. 74, 85-87, 389 P.2d 538, 549-551. To challenge these approvals, the Petitioner must show that the evidence considered by HUD and the Agency was so false or fraudulent that it cannot be deemed "substantial evidence."

The appraisal of R. Dean Stahr, the only evidence on the issue of fair value presented by Petitioner to the lower court, does not raise a genuine material issue of fact when considered in accordance with the substantial evidence standard. Nothing in the Stahr appraisal indicated that the data or methodology of the Lane appraisal and the other evidence presented to HUD and the Agency were false or fraudulent. Stahr, at most, simply offers another opinion.

The appraisal of Mr. Stahr concluded that the land

at the Santa Rosa shopping center site, if marketed in small parcels, could be sold for $5 per square foot. (App. pp. 170-171.) This price compared with the $2 per square foot estimated by Lane as the fair value for a sale of the entire site. (R.App. pp. 21, 30, 37.) However, the appraisal of Lane also noted that if the land were sold in parcels, as suggested by Stahr, more than half of the site would be required to be devoted to public parking, with the result that only half as many acres would be sold (R.App. pp. 33-34.) Lane also observed that the anti-speculation and other restrictive regulations of the redevelopment plan — which provide that land cannot be sold except to a buyer who agrees to prompt development of a specific project — would make any parcel sale program a difficult and protracted venture that would force the Agency to incur substantial carrying costs for interest and lost taxes. (R.App. p. 31.) In summary, after making appropriate adjustments for the square footage of the site that could be sold as parcels and all costs of such sales, the Stahr appraisal is not even inconsistent with the fair value determinations of the Respondents much less a challenge to the integrity of the evidence Respondents considered when approving the Hahn contract.

In addition to being irrefutably lawful under state and federal housing and redevelopment laws when evaluated by the "substantial evidence" standard, the Agency approval of the Hahn contract is clearly state mandated local government action outside the purview of the antitrust law under the rationale of *Lafayette* v. *Louisiana Power & Light Co.*, supra. By its

Community Redevelopment Law (Health and Safety Code section 33000 et seq.), the California State Legislature has created a redevelopment agency in each local community. (Health and Safety Code section 33100.) The agency is directed by state law to identify blighted areas. In discharging this legislative delegation of authority, a redevelopment agency acts as an agent of state government. *Fellom* v. *Redevelopment Agency* (1958) 157 Cal.App.2d 243, 320 P.2d 884. (R.App. pp. 181-185.) The state controls local redevelopment both by explicit statutory limitations (Health and Safety Code sections 33030-33032) and procedures and by authorizing any public entity or individual to bring a validating proceeding to test the validity of any blight determination by a redevelopment agency. (R.App. p. 208.)

The state legislature has mandated that when an area has been validly found to be blighted the appropriate redevelopment agency shall intervene in private land use and the real estate market to eliminate inadequate public utilities, deteriorating physical structures, and the other characteristics of blight (Health and Safety Code section 33037). The finding of blight is tantamount to a determination that the private competitive market has not worked. Even if such agency action is characterized as anti-competitive, it is nonetheless action pursuant to a state policy that is intended to displace competition with regulation. The District Court properly deduced that the Sherman Act cannot be applied to defeat the legitimate governmental purposes of urban renewal.

Neither the District Court nor the Court of Appeals

found need to decide whether the evidence presented a genuine triable issue as to Petitioner's contention that the Hahn contract imposed an unfair competitive disadvantage on Rohnert Park developers. In the last analysis, Petitioner's assertion that the sale of land to Hahn is a subsidy that confers an unfair competitive advantage upon Hahn in violation of Sherman Act sections 1 and 2 must rise or fall on the evidence of whether Hahn will have any competitive advantage at all. The sole evidence in the record as to Hahn's advantage or disadvantage with respect to potential Rohnert Park developers, considering Hahn's total contract consideration and costs, is the testimony of Mr. Ernest W. Hahn, president of Hahn, at the hearings of the Agency. According to Mr. Hahn, Hahn faces a competitive disadvantage against suburban developers of $6 million (R.App. p. 14) or $5.6 million (R.App. p. 17). Petitioner has offered no rejoinder.

CONCLUSION

The Petitioner had ample notice and opportunity to be heard in the lower courts on the issues which it requests this Court hear. The decision of the Court of Appeals is consistent with the decisions of this Court, the court below, and the other federal courts. The decision must also be affirmed on several alternative grounds. For these reasons, the Santa Rosa Respondents respectfully submit that the petition for writ of certiorari should be denied.

Dated, Sacramento, California
February 21, 1980.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 1980, in accordance with Rule 33, Rules of the Supreme Court of the United States, three copies of the Brief in Opposition to the Petition for Writ of Certiorari and separate Appendix were mailed postage prepaid to the counsel of record of Petitioner and other Respondents as stated below:

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I further certify that all parties required to be served have been served.

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